LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
APR 21 1950
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1949~~ 1950

No. ~~[illegible]~~ 50

CARL JACOB KUNZ,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

OSMOND K. FRAENKEL,
Counsel for Appellant.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
The statutory provisions believed to sustain the jurisdiction	1
The statutes and administrative codes and procedures which are involved	2
Date of judgment or decree sought to be reversed and the date upon which the application for appeal is presented	4
Statement showing that the nature of the case and of the rulings of the Court are such as to bring the case within the jurisdictional provision relied upon	4
Statement of the grounds upon which it is contended that the questions involved are substantial	6
Summary	6
Facts	8
Propositions and authorities	9
Argument	10
Section 435-7.0 of the Administrative Code of the City of New York contains inherent powers of censorship, suppression and previous restraint	10
The section fails to prescribe proper standards for the exercise of official discretion	13
The section infringes upon freedom of speech and religion by the use of broad and vague prohibitions upon the content of a speaker's remarks	15
The section requires previous registration as a condition to exercising the right to make a public speech. For all of the foregoing reasons this appeal should be allowed	17

Page

Cases believed to sustain the jurisdiction 18

Appendix "A"—Opinon of the Court of Appeals of the State of New York 19

Table of Cases Cited

Board of Education v. *Barnette*, 319 U. S. 624 9

Cantwell v. *Connecticut*, 310 U. S. 296 9, 10, 13, 16

Chaplinsky v. *New Hampshire*, 315 U. S. 568 14

Cox v. *New Hampshire*, 312 U. S. 569 18

Hague v. *C.I.O.*, 307 U. S. 446 9, 11, 13, 14

Jamison v. *Texas*, 318 U. S. 413 9, 18

Kovacs v. *Cooper*, 336 U. S. 77 14

Kunz v. *People of the State of New York*, 300 N. Y. 273 18

Largent v. *Texas*, 318 U. S. 418 9

Lovell v. *City of Griffin*, 303 U. S. 444 9, 11, 13, 14, 18

Near v. *Minnesota*, 283 U. S. 697 9, 11

Saia v. *New York*, 334 U. S. 558 9, 14, 18

Schneider v. *State*, 308 U. S. 147 9, 17

Standard Oil Co. v. *Johnson*, 316 U. S. 481 18

Terminiello v. *Chicago*, 337 U. S. 1 10, 16

Thomas v. *Collins*, 323 U. S. 516 9, 10, 16, 17, 18

Statutes Cited

Administrative Code of the City of New York, Chapter 18, Section 435-7.0 1, 2, 4, 8, 9

Constitution of the United States:

First Amendment 5, 7, 9

Fourteenth Amendment 5, 7, 9

United States Code, Title 28, Section 1257 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 768

CARL JACOB KUNZ,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant having presented this day his petition for appeal now files this, his statement, of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment in question and to exercise such jurisdiction in this case.

The Statutory Provisions Believed to Sustain the Jurisdiction

This appeal is prosecuted from a judgment of the Court of Appeals of the State of New York, which is the highest Court in the State of New York in which a decision in the within matter can be had. There is drawn in question the validity of Section 435-7.0, Chapter 18, of the Administrative Code of the City of New York, on the ground that, on

its face and as construed and applied to appellant, it is repugnant to the Constitution of the United States. The decision of the Court of Appeals was in favor of the validity of said section. This Court has jurisdiction on appeal to review the final judgment in question by virtue of the express provisions set forth in Title 28, U. S. C., Sec. 1257.

The Statutes and Administrative Codes and Procedures Which Are Involved

Section 435-7.0 of Chapter 18 of the Administrative Code of the City of New York reads as follows:

> "a) PUBLIC WORSHIP.—It shall be unlawful for any person to be concerned or instrumental in collecting or promoting any assemblage of persons for public worship or exhortation, or to ridicule or denounce any form of religious belief, service or reverence, or to preach or expound atheism or agnosticism, or render any pretense therefor, in any street. A clergyman or minister of any denomination, however, or any person responsible to or regularly associated with any church or incorporated missionary society, or any lay-preacher or lay-reader may conduct religious services, or any authorized representative of a duly incorporated organization devoted to the advancement of the principles of atheism or agnosticism may preach or expound such cause, in any public place or places specified in a permit therefor which may be granted and issued by the police commissioner. This section shall not be construed to prevent any congregation of the Baptist denomination from assembling in a proper place for the purpose of performing the rites of baptism, according to the ceremonies of that church.
>
> "b) INTERFERENCE WITH STREET SERVICES.—It shall be unlawful for any person to disturb, molest or interrupt any clergyman, minister, missionary, lay-preacher or lay-reader, who shall be conducting religious services by authority of a permit issued hereunder, or any

minister or people who shall be performing the rites of baptism as permitted herein, nor shall any person commit any riot or disorder in any such assembly.

"c) VIOLATIONS.—Any person who shall violate any provision of this section, upon conviction thereof, shall be punished by a fine of not more than twenty-five dollars, or imprisonment for thirty days, or both."

The official procedures and rules and regulations relative to this section provide substantially as follows:

An applicant for a Public Worship Permit must file his application at the Division of Licenses. He is required to furnish two photographs of himself "1½ inches square, of recent date." The application requests information as to the background and training of the applicant, his "qualifications" for the permit, whether the applicant intends to make collections or sales at meetings; it requires three references. It goes on to ask whether the applicant ever had a Public Worship Permit, whether his application has ever been disapproved, and whether his permit has ever been revoked. A self-addressed, stamped envelope is to accompany the application. No inquiry appears on the application concerning the places where or times when the applicant desires to hold his meetings (Ex. A, pp. 48, 49, 50).

A permit when issued bears the permit number, date of issue and expiration, the photograph of the holder and states that:

"Permission to Conduct Outdoor Religious Services in the City of New York, Subject to Regulations as Described Below:

Is Granted To: —— ——.
Address: ——.

(Organization under whose auspices meeting is conducted)."

No times or places of meetings are designated on the permit (See Ex. B, p. 50), but the holder is instructed in the regulations governing the use of the permit, printed in small type under the name and address Ex. B, p. 51), to notify the Commanding Officer of the Precinct of the time and location of any street meeting he or she intends to hold, and advises that the Commanding Officer will approve of the location provided it does not interfere with traffic or other local conditions. The regulations on the permit state that all meetings must be conducted in an orderly manner and only under the auspices of the organization mentioned above and that the person conducting the meeting must prevent any collections, contributions or sales. There is a further statement that the permit is issued in accordance with Chapter 18, Section 435-7.0 of the Administrative Code of the City of New York and is revocable at any time.

If the application is disapproved, the applicant receives a "Disapproval" which states simply: "Your application for Public Worship Permit has been disapproved." (Ex. C, p. 52). He then may not conduct a meeting at any time in any street throughout the entire City of New York.

Date of Judgment or Decree Sought to Be Reversed and the Date upon Which the Application for Appeal Is Presented.

The judgment of the Court of Appeals which is here sought to be reversed was rendered on December 29, 1949. This application for appeal is presented March 15th, 1950.

Statement Showing That the Nature of the Case and of the Rulings of the Court Are Such as to Bring the Case Within the Jurisdictional Provision Relied upon.

Appellant was charged with violation of Section 435-7.0 of the Administrative Code of the City of New York in that

he conducted a religious meeting on September 11, 1948 in the City and State of New York without a permit (p. 5). He was tried and convicted by a city magistrate and fined ten dollars or three days in the city prison (p. 7). The fine was paid (p. 8).

At his trial appellant, at the end of the People's case, moved to dismiss the complaint, asserting that the section was unconstitutional on its face as an abridgment of his rights guaranteed under the First and Fourteenth Amendments to the Federal Constitution (pp. 18-21). The motion was denied (p. 21). At the end of the entire case the motion to dismiss was renewed, appellant again asserting the unconstitutionality of the section, the administrative procedure thereunder and its application to him (pp. 38-42). The motion was again denied (p. 42).

Pursuant to the prescribed appellate procedure, appellant appealed from the judgment in the Magistrate's Court to the Appellate Part of the Court of Special Sessions (p. 3), there again asserting the invalidity and unconstitutionality of the section on its face, its implementing administrative procedures and its application to him (p. 4). That Court affirmed the judgment rendered in the Magistrate's Court (p. 61).

Appellant then obtained leave to appeal to the Court of Appeals of the State of New York (p. 59). That Court is the highest court in the State in which a decision upon the matter could be had. There again appellant asserted the unconstitutionality of the section on its face, its implementing administrative procedures and its application to him (See Opinion, Appendix). The decision of the Court of Appeals was made solely on the basis of the constitutional questions raised.

The judgment of the court below was affirmed by a divided court in said Court of Appeals; four judges af-

firmed the conviction and in their written opinion upheld the validity of the section, its implementing administrative procedures and its application to appellant; three judges voted for reversal, expressing their dissents in two separate opinions (See Appendix).

The opinion of the majority, sustaining the constitutionality of the section and the conviction of the appellant thereunder, construed the section, read together with its implementing, administrative procedure, as follows:

1. To require the Police Commissioner to grant, on initial application therefor, an annual permit for street preaching generally to anyone who is a minister of religion, and to allow police control only to the extent of requiring a holder of a permit to obtain approval of proposed time and locations for meetings from commanders of local police precincts; the local commander to approve the location for a holder of a permit if traffic and other local conditions permit;

2. To authorize the Police Commissioner to revoke a permit previously granted and to refuse to issue further annual permits on subsequent application therefor upon the commissioner's administrative finding that the applicant had ridiculed and denounced religion and would do so again if permitted to speak, and upon the commissioner's finding and belief that disorder had resulted at earlier meetings in the absence of police protection and that disorder might result at future meetings, if they were permitted, unless a policeman were present.

Statement of the Grounds upon Which It Is Contended That the Questions Involved Are Substantial

Summary

The validity of the section as construed and applied was upheld by a divided court—four judges affirming the judg-

ment of conviction and three judges dissenting. Sharp differences on the question of the constitutionality of a statute such as this are revealed in the majority and the two dissenting opinions. The opinions indicate further that there is uncertainty as to the interpretation and effect to be given to decisions by this Court on the validity of permit requirements for the exercise of the rights of speech, assembly or religion in streets and public places. Thus, the opinion of the majority seems to find authority in prior decisions of this Court for holding to the following effect:

1. Inherent powers of administrative censorship and suppression conferred in a permit statute are not objectionable if they are required to be held in abeyance until an initial application for a permit has been granted; thereafter, the issuing authorities are free to exercise such powers of administrative censorship and suppression.

2. Although a single policeman has had no difficulty in maintaining order at a street preacher's religious meetings, the fact that there have been indications of disorder at such meetings when no policeman was present, and that it is believed that disorder may occur at future meetings if no policeman is present, justifies complete and apparently permanent suppression of a right to conduct a religious meeting at any time on any street throughout an entire city; power so to act may be conferred upon and employed by a police commissioner through a permit system.

It is submitted that substantial federal questions are involved when a municipal ordinance has been construed and applied to have such effects, yet has been held by the majority of the court below not to be repugnant to the provisions of the First and Fourteenth Amendments to the Constitution.

Facts

Appellant is a preacher who states that it is his religious practice and conviction to "go out on highways and byways and preach the word of God." (p. 22). He reads from various Bibles and publications and attempts to refute dogmas he considers wrong or untrue particularly in the Roman Catholic version of the Bible and official Roman Catholic publications (p. 23).

In 1946 appellant spoke at Hanover Square in the City of New York while holding an annual permit issued by the Police Department. On or about November 7, 1946, this permit was revoked by a letter handed to appellant by a policeman while appellant was speaking (p. 28). The revocation stated that, after hearings held, the Commissioner was of the opinion that appellant "contrary to the provisions of law under which the permit was issued, ridiculed and denounced religion", the letter stating, "I am, therefore, in the exercise of discretion as provided by law, revoking your permit effective forthwith" (pp. 29, 30). Appellant then filled out the required application form for the next year, 1947, but his application was "Disapproved" (p. 28). His application for 1948 was also "Disapproved" (p. 27, Ex. c, p. 52). On September 11, 1948, appellant spoke at Columbus Circle without a permit and was given a summons by Francis T. Sullivan, the complaining police officer (pp. 10, 12).

There was no charge of interference with traffic or other disorder. Appellant was not charged with ridiculing or denouncing any form of religious belief or practice. The charge was *solely* violation of the section by conducting a religious meeting without a permit.

Appellant, at the end of the People's case, moved to dismiss the complaint on the ground that Section 435-7.0

is invalid on its face and that its operation and its application to him abridges his freedom of religion and speech as guaranteed by the First and Fourteenth Amendments to the Federal Constitution as well as under parts of the State Constitution (pp. 18-21). The motion was denied (p. 21). The motion was renewed at the end of the entire case (pp. 38-42) and also denied (p. 42).

Propositions and Authorities

Appellant contends that Section 435-7.0, Chapter 18, of the Administrative Code of the City of New York, read either alone or together with its administrative machinery and as construed by the Police Commissioner and the court below is repugnant to the Constitution of the United States because:

I. It contains inherent powers of censorship, suppression and previous restraint.

Near v. *Minnesota*, 283 U. S. 697.
Lovell v. *City of Griffin*, 303 U. S. 444.
Hague v. *C. I. O.*, 307 U. S. 446.
Schneider v. *State*, 308 U. S. 147.
Cantwell v. *Connecticut*, 310 U. S. 296.
Jamison v. *Texas*, 318 U. S. 413.
Largent v. *Texas*, 318 U. S. 418.
Board of Education v. *Barnette*, 319 U. S. 624.
Thomas v. *Collins*, 323 U. S. 516.
Saia v. *New York*, 334 U. S. 558.

II. It fails to prescribe proper standards for the exercise of official discretion.

Lovell v. *Griffin*, 303 U. S. 444.
Hague v. *C. I. O.*, 307 U. S. 446.
Saia v. *New York*, 334 U. S. 558.

III. It infringes upon freedom of speech and religion by the use of broad and vague prohibitions upon the content of a speaker's remarks:

Cantwell v. *Connecticut*, 310 U. S. 296.
Thomas v. *Collins*, 323 U. S. 516.
Terminiello v. *Chicago*, 337 U. S. 1.

IV. It requires previous registration and identification as a condition to exercising the right to make a public speech.

Thomas v. *Collins*, 323 U. S. 516.

ARGUMENT

I

Section 435-7.0 of the Administrative Code of the City of New York Contains Inherent Powers of Censorship, Suppression and Previous Restraint.

The section tolerates speech on religious topics upon the city's streets by those who fall into specified categories only. While the court below has construed the section to require the police commissioner to issue an annual permit to a person coming within the categories upon his initial application therefor, it has upheld the police commissioner's claim that he may thereafter, in the exercise of his discretion:

1. Revoke the permit upon an administrative finding that the holder has ridiculed and denounced religion;

2. Revoke the permit upon an administrative finding that disorder has resulted at the permittee's meetings when no policeman was present;

3. Deny subsequent applications for annual permits because of his belief that the applicant, if permitted to speak, will ridicule and denounce religion;

4. Deny subsequent applications for annual permits because of his belief that it will be necessary for a policeman to attend the applicant's meetings to prevent possible disorder.

The commissioner has so exercised his discretion in this case. He revoked appellant's 1946 permit and denied him permits upon his application therefor in 1947 and in 1948, thus barring him from holding a religious meeting at any time in any street and under any circumstances throughout the entire City of New York.

Permit statutes which enable issuing authorities to exercise such powers of censorship, suppression and previous restraint have been declared repugnant to the Constitution by this Court.

Lovell v. *City of Griffin*, 303 U. S. 444.

Hague v. *C. I. O.*, 307 U. S. 446.

Schneider v. *State* 308 U. S. 147.

A statute in which such powers are inherent cannot be rendered innocuous because of the fact that the statute has been construed to prohibit the exercise of such powers upon an initial application for a permit. The protection afforded by the Constitution against censorship, suppression and previous restraint cannot have such limited scope and retain any meaning or significance. Rights guaranteed under the Constitution are entitled to continuous protection.

Appellant has, by the operation of the statute involved, suffered an absolute and previous restraint upon his speech because of alleged past offenses. His case, as the dissenting opinion of Judge Bromley points out, "affords a striking parallel to *Near* v. *Minnesota*, (283 U. S. 697)". There the future publication of a newspaper had been enjoined upon the ground that it had offended in the past

through publishing "malicious, scandalous and defamatory articles" (p. 703). This Court struck down the injunction because of the censorship and previous restraint established thereby. As the dissent here states, "The absolute and previous restraint upon the speech of Kunz surely can stand upon no stronger ground than the decrees condemned in *Near* v. *Minnesota.*".

Moreover, even upon the initial application for a permit which the court below has ruled must be issued to a "minister of religion", the police commissioner must exercise discretion of a kind which has been condemned by this Court as a previous restraint. Not everyone is eligible for a permit. A minister of religion is. The issuance of a permit to an applicant claiming to be a minister of religion depends upon affirmative action on the part of the commissioner. He must determine whether the application is a minister of religion. This involves "appraisal of facts, the exercise of judgment and the formation of an opinion" (*Cantwell* v. *Connecticut*, *supra*, p. 305). This Court has declared that determinations of this kind constitute censorship and are repugnant to the Constitution (*Cantwell* v. *Connecticut*, *supra*.)

It should be noted further that those who admittedly do not fall into the prescribed categories and who are therefore ineligible for permits may not under any circumstances express their opinions on religious subjects at any time on any street. A large percentage of the population is thus denied the right and freedom to communicate views and disseminate opinion in places unequivocally held by this Court to be proper for that purpose (*Jamison* v. *Texas*, *supra*, p. 416; *Schneider* v. *State*, *supra*, p. 163).

II

The Section Fails to Prescribe Proper Standards for the Exercise of Official Discretion.

It has been repeatedly held by this Court that permit requirements for the exercise of constitutional liberties on the streets serve legitimate ends only when they are designed to permit determination of appropriate times and places for proposed activities on the streets—the convenience of others using the streets alone can serve as the standard of discretion for the issuing authorities.

Lovell v. *City of Griffin*, 303 U. S. 444.
Hague v. *C. I. O.*, 307 U. S. 446.
Cantwell v. *Connecticut*, 310 U. S. 296.

We submit that the statute involved in this appeal as construed and applied is devoid of such standards. Among the many questions on the official application form, not one concerns itself with the time or place for meetings. The local police commander is directed by the rule and regulations of the police department to approve time and locations for proposed religious meetings if traffic and other local conditions permit, for *holders of permits* only. Those to whom a permit has been denied may not obtain approval from local police commanders for meetings at even the most innocuous times and places. Thus a holder of a permit may speak everywhere on the streets, if conditions permit, whereas one to whom a permit has been denied may not speak anywhere on the streets, regardless of conditions.

A permit system which grants or denies an applicant blanket permission to use the streets of the city for religious meetings is repugnant to the Constitution. The defect inherent in the permit system is not cured by the fact that once a permit is issued, the holder is subjected

to unobjectionable local police supervision. The vice in the system is the lack of proper standards, not for the local police captains, but for the issuing authority's discretion.

Lovell v. *City of Griffin*, 303 U. S. 444.
Saia v. *New York*, 334 U. S. 558.

In this case the Court of Appeals has upheld the challenged ordinance on the theory that a man may be denied the right to speak in the future because of remarks he has made in the past (and for which he has never been prosecuted) which might produce disorder if repeated, although the record shows (p. 35) that when even a single policeman was present no disorder actually occurred.

In reaching this conclusion the Court of Appeals relied on this Court's remarks in the *Chaplinsky* case (315 U. S. 568) with regard to "fighting" words. But of course these remarks were made in review of a prosecution for the use of such words under particular provocative circumstances.

The New York Court also suggested that this ordinance comes within the rule of the *Koraes* case (336 U. S. 77) because a community has a right to stop the starting of religious wars. Of course this suggestion goes too far, because it could hardly be supposed that a community could prohibit all discussion of religious subjects on its streets. In any case, potential disorder because of speech has not been considered ground for the prohibition of such speech in advance. In *Hague* v. *C. I. O.*, (307 U. S. 446) this Court struck down an ordinance which expressly made potential disorder a measure of administrative discretion. The New York Court therefore by reading such similar discretion into this ordinance leaves it open to the same condemnation.

It is the duty of municipalities to maintain order, not to limit freedom of expression. Whatever right the au-

thorities may have had to prosecute appellant if his remarks presented a clear and present danger of disorder, they have no right whatever to prevent him from speaking. As Judge Conway has noted in his dissent:

> "Police protection may well be necessary to secure for this defendant his constitutional right to speak freely as an ordained Baptist clergyman. The Constitution does not discriminate between those whose ideas are popular and those whose views arouse hatred and animosity—guaranteeing the right of freedom of speech to the former and withholding it from the latter. This defendant has the right to express himself concerning religious beliefs no matter how misguided and unpopular they may be and if his exercise of that right arouses passion in the community and requires the attendance of police officers, that is a small cost which must be paid by us for our continued freedom."

III

This Section Infringes upon Freedom of Speech and Religion by the Use of Broad and Vague Prohibitions upon the Content of a Speaker's Remarks.

The court below has, in effect, decreed that an administrative official can bar a speaker from the streets if he has determined that his past speech fell within the condemnation of the statute against ridicule or denouncing of religion. The majority of the court below referring to this prohibition states the following:

> "It may be that the first sentence of this ordinance, making it unlawful for anyone to 'ridicule or denounce any form of religious belief, service or reverence', if read off by itself, and without relation to the rest of the ordinance, or of these facts may be thought unconstitutional. But we have no such question here."

If the prohibition itself is unconstitutional, and could not be sustained on a formal charge of its violation, such prohibition should not be indirectly enforced through the device of a permit system (*Thomas* v. *Collins*, *supra*; *Cantwell* v. *Connecticut*, *supra*). And even if the prohibition is constitutional, it cannot be the basis of prior restraint (*Near* v. *Minnesota*, *supra*.)

As Judge Conway said in his dissent:

> "Assuming that the prohibition against ridiculing or denouncing religion is constitutional, the sole means of enforcement is through a criminal action charging its violation or in a proper case charging disorderly conduct under section 722 of the Penal Law; section 1458 of the New York City Consolidation Act (L. 1882, ch. 410); *People* v. *Galpern* (259 N. Y. 279, 282), and *People* v. *Hipple* (263 N. Y. 242). (See, also, New York City Charter, § 435.) It cannot be enforced by a trial of the alleged offender before an administrative officer, nor can an administrative finding of guilt thereof be made the basis for a refusal to grant a permit."

Clearly a prohibition of such breadth and generality would improperly impair liberty of expression and religion.

Cantwell v. *Connecticut*, 310 U. S. 296
Thomas v. *Collins*, 323 U. S. 516
Terminiello v. *Chicago*, 337 U. S. 1

Comment on religion is peculiarly susceptible to varied interpretation by different individuals. It would appear to be almost impossible for anyone urging the exclusive truth of his concept of the Deity or non-existence of a deity to avoid indicating to some more or less sensitive member of an audience that his beliefs or practices were being ridiculed or denounced. As this Court has commented:

> "General words create different and often particular impressions on different minds. No speaker, however

> artful, can convey exactly his meaning or the same meaning to the different members of an audience." (*Thomas* v. *Collins, supra,* p. 534).

A prohibition such as this offers no security for free discussion. It "blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." (*Thomas* v. *Collins, supra,* p. 535).

IV

The Section Requires Previous Registration as a Condition to Exercising the Right to Make a Public Speech

If the section were free from other objectionable features and is to be considered a requirement merely for identification or previous registration, it would nevertheless be incompatible with an exercise of the rights of free speech and assembly. As this Court said in *Thomas* v. *Collins,* 323 U. S. 516, 539:

> "As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the right of free speech and free assembly. Lawful public assemblies, involving no element of grave and immediate danger to an interest the state is entitled to protect, are not instruments of harm which require previous identification of the speakers."

Under its most favorable interpretation, the section requires annual registration and identification as a condition to the exercise of the right to make a public speech to rally support for a religious or anti-religious cause. The court below has construed the section to be such, at least upon the first application of a minister of religion. Even if the court below had construed the section to give no further powers to the police commissioner, and if the section were a simple

requirement for registration and identification, it would be invalid as a previous restraint. The powers of censorship and suppression given by the section to the issuing authority emphasize the invalidity of the section.

V

For All of the Foregoing Reasons This Appeal Should Be Allowed

Cases Believed to Sustain the Jurisdiction

Jamison v. *Texas*, 318 U. S. 413
Saia v. *New York*, 334 U. S. 558
Standard Oil v. *Johnson*, 316 U. S. 481
Thomas v. *Collins*, 323 U. S. 516
Lovell v. *City of Griffin*, 303 U. S. 444
Cox v. *New Hampshire*, 312 U. S. 569

Statement Respecting Opinions

The opinion for the majority of the Court of Appeals of the State of New York was written by Desmond, J. with Loughran, Ch. J., Lewis and Dye, JJ. concurring. A dissenting opinion was written by Conway, J., and a separate dissenting opinion was written by Bromley, J. in which Fuld, J. concurred. Copies of said opinions are annexed hereto as an appendix. They are reported in 300 N. Y. 273.

Respectfully submitted,

OSMOND K. FRAENKEL,
Attorney for Appellant.

APPENDIX

OPINIONS OF THE COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* CARL JACOB KUNZ, Appellant

Argued October 5, 1949; Decided December 29, 1949

Constitutional law—municipal ordinances—meetings for religious purposes on city streets—police regulation—validity of requirement for permit—(1) clergyman convicted of violating ordinance forbidding preaching of religion on streets of New York City without permit; permit granted defendant had been revoked for denunciation of religions contrary to ordinance; conviction affirmed—(2) ordinance requires issuance of permit to clergyman and certain others and regulations give police control only by requiring advance notice of meeting and approval of location subject to traffic conditions; ordinance necessary street regulation; requirement of permit not unconstitutional here—(3) revocation of permit reviewable under article 78 of Civil Practice Act; impropriety of such revocation no defense here—(4) since defendant used permit to utter insults tending to incite disorder, public order and decency required that meetings be stopped.

1. A clergyman has been convicted of violating section 435-7.0 of the New York City Administrative Code which forbids any person to be instrumental in collecting an assemblage of persons for public worship or to ridicule religion or to preach atheism or agnosticism on the streets of the city, but authorizes preaching or expounding by one who has obtained a permit as an authorized representative of a religious, atheistic or agnostic group. When arrested, defendant was conducting a religious meeting but without the required permit. Upon this appeal he contends that the statute is unconstitutional on its face. The conviction should be affirmed.

2. As construed by the police department and as here applied, the ordinance is not unconstitutional either as

allowing the police commissioner to determine as a censor who may address the public on the streets or as prohibiting ridicule of religion. Reading into the ordinance the governing police regulations, it is clear that, merely upon application therefor, such a permit is granted for one year to any of the persons listed in the ordinance. Police control of meetings is allowed only to the extent of requiring advance notice to a police captain who must approve of the location requested unless traffic conditions make it inexpedient to use that site for such purpose. So read, the law is no more than a necessary and reasonable regulation of the use for public meetings of the crowded streets of a great city.

3. After a hearing on charges, defendant's permit to speak was revoked because "contrary to the provisions of law under which the permit was issued" he had "ridiculed and denounced religion". Subsequent applications by defendant for permits were denied and at the time of his arrest for speaking without a permit, he was again delivering denunciations against the same religions. Power to revoke such a permit for cause, while not specifically mentioned, is implied and, in any case, alleged illegality of a revocation is reviewable by proceedings in the nature of certiorari (Civ. Prac. Act, art. 78). Moreover, impropriety of the revocation of a former license in this case was no defense.

4. While the prohibition against ridiculing or denouncing any religion—read by itself—might be thought unconstitutional, here, defendant got his permit with no questions asked as to what he would preach and he used the permit to utter insults and epithets tending to incite disorder. A police regulation, printed on the permit, stated that "all meetings must be conducted in an orderly manner". Public order and decency required that defendant be stopped.

Appeal, by permission of an Associate Judge of the Court of Appeals, from a judgment of the Court of Special Sessions of the City of New York, Appellate Part, in the first judicial department, entered March 14, 1949, which

affirmed a judgment of a Magistrate's Court of the City of New York, Borough of Manhattan (Silver, M.), convicting defendant of unlawfully conducting a religious meeting without a permit in violation of section 435-7.0 of the Administrative Code of the City of New York.

Osmond K. Fraenkel and *Mercedes Hoffman* for appellant. I. Section 435-7.0 of the Administrative Code of the City of New York is unconstitutional on its face since it prohibits the use of the streets altogether to all persons who would preach, exhort or expound on religious or anti-religious topics who do not fit into certain specified categories. (*Jamison* v. *Texas*, 318 U. S. 413; *Schneider* v. *State*, 308 U. S. 147.) II. The section sets up no proper standards for the exercise of official discretion. (*Lovell* v. *City of Griffin*, 303 U. S. 444; *Saia* v. *New York*, 334 U. S. 558; *Hague* v. *C. I. O.*, 307 U. S. 496.) III. The section requires and enables the police commissioner to determine as a censor who may address the public on the streets. (*Cantwell* v. *Connecticut*, 310 U. S. 296; *Largent* v. *Texas*, 318 U. S. 418; *Jamison* v. *Texas*, 318 U. S. 413; *Thomas* v. *Collins*, 323 U. S. 516; *Lovell* v. *City of Griffin*, 303 U. S. 444; *Schneider* v. *State*, 308 U. S. 147; *Hague* v. *C. I. O.*, 307 U. S. 496; *Saia* v. *New York*, 334 U. S. 558.) IV. The section infringes upon freedom of speech and religion by the use of broad and vague prohibitions upon the content of a speaker's remarks. (*Cantwell* v. *Connecticut*, 310 U. S. 296; *Thomas* v. *Collins*, 323 U. S. 516; *Terminiello* v. *Chicago*, 337 U. S. 1.) V. The section requires previous registration and identification as a condition to exercising the right to make a public speech. *Thomas* v. *Collins*, 323 U. S. 516.) VI. The unconstitutional features of the section apparent on its face are confirmed and emphasized by the rules and regulations and official practice and procedure of the police department and the police commissioner. (*People* v. *Nahman*, 298 N. Y. 95; *Cox* v. *New Hampshire*, 312 U. S. 569.) VII. The section as applied to defendant is unconstitutional and an abridgment of his freedom of speech and religion. (*Saia* v. *New York*, 334 U. S. 558; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Sellers* v. *Johnson*, 163 F. 2d 877, 332 U. S. 851; *West Virginia*

State Bd. of Educ. v. *Barnette*, 319 U. S. 624.) VIII. The unconstitutional features of the section are not cured by the possibility of judicial review of administrative acts. IX. *People* v. *Smith* (263 N. Y. 255), relied on by the court below, does not represent the law at the present time and should not be followed in this case.

John P. McGrath, Corporation Counsel (*Joseph J. Lucchi* and *Seymour B. Quel* of counsel), for respondent. I. A virtually identical statute was upheld in *People* v. *Smith* (263 N. Y. 255), which has not been overruled. II. Ordinances similar to section 435-7.0 have been found valid by the Court of Appeals and by the United States Supreme Court. (*Cox* v. *New Hampshire*, 312 U. S. 569; *Prince* v. *Massachusetts*, 321 U. S. 158; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *People* v. *Nahman*, 298 N. Y. 95; *People* v. *Hass*, 299 N. Y. 190; *People* v. *Lewis*, 295 N. Y. 42; *Kovacs* v. *Cooper*, 336 U. S. 77.)

Desmond, *J.* Defendant, a clergyman, was convicted and fined $10, after a trial before a New York City Magistrate, for violating section 435-7.0 of that City's Administrative Code. The material parts of that statute (which is set out in full at the beginning of Judge Conway's opinion in this case) may be summarized as follows:

1. It shall be unlawful in any New York City street, for anyone to collect a crowd for public worship or exhortation, or to ridicule or denounce any religious belief, or to preach atheism or agnosticism;

2. However, any clergyman or authorized representative of any religious group, or of any atheistic or agnostic society, may preach or expound his cause, in any public place specified in a permit which may be granted him by the police commissioner;

3. Any violation is punishable by a fine of not more than $25, or thirty days' imprisonment, or both.

Appellant insists that this law is unconstitutional on its face, for a number of reasons, principally because, as defendant thinks, it allows the police commissioner, uncontrolled by any proper standards, "to determine as a censor

who may address the public on the streets", and because it prohibits any ridicule or denunciation of religion by anyone. We do not think that the statute, as administratively construed by the New York City Police Department and as applied here, is invalid for either of those asserted reasons.

Although this section says in its first paragraph that a street-preaching permit "may be granted and issued" by the police commissioner, to any of the persons listed, this record shows that such a permit is granted to any such person, on mere application therefor. Each such permit is for a calendar year and specifies no time or place for speaking, but, on the face of the permit there is printed a police department regulation requiring the permittee to notify the commander of the police precinct concerned, of the proposed time and place of any street meeting, whereupon "The Commanding Officer will approve of the location providing it does not interfere with Traffic or other local conditions." Reading those regulations into the ordinance, as we can and should (see *People* v. *Nahman*, 298 N. Y. 95, and *People* v. *Hass*, 299 N. Y. 190, appeal dismissed 338 U. S. 803, rehearing denied 338 U. S. 881), we construe the ordinance as requiring the commissioner to give an annual permit for street preaching, to anyone who, like defendant, is a minister of religion, and as allowing police control of meetings only to the extent of requiring advance notice to a police captain who must approve of the location, unless traffic conditions there make it inexpedient to use that site for such purposes. Thus read, the law is no more than a necessary and reasonable regulation of the use, for public meetings, of the crowded streets of the world's greatest city, "general and non-discriminatory legislation [regulating] the times, the places, and the manner of" holding street meetings (*Cantwell* v. *Connecticut*, 310 U. S. 296, 304; see *Cox* v. *New Hampshire*, 312 U. S. 569). The possible unconstitutionality of this permit procedure, as curtailing the rights of those who are not clergyman, like defendant, is not for defendant to argue or for us to consider in this case (*O'Kane* v. *State of New York*, 283 N. Y. 439, 449). Thus, that part of the

statute which deals with permits is clearly not unconstitutional. The other part, forbidding the denunciation or ridicule of religion, will be dealt with herein after we have summarized the additional facts of this case.

In 1946, defendant applied to the commissioner for, and received, a permit for street preaching. The meetings he held during that year brought to the commissioner's desk a flood of complaints from citizens who charged that defendant had, in violent words, denounced two great religions, each of which has very large membership in New York City. The commissioner thereupon, on notice to defendant, scheduled a hearing on such charges, before a deputy commissioner. A two-day hearing followed, at which defendant and eighteen complainants appeared and gave testimony. The complaints were amply proven, and the commissioner wrote defendant that his permit was revoked, because he had "contrary to the provisions of law under which the permit was issued, ridiculed and denounced religion". Later defendant, successively, applied for permits for 1947 and 1948, but in each instance he was notified of disapproval. On September 11, 1948, without a permit, he held a religious meeting at Columbus Circle, in Manhattan, and again delivered himself of violent diatribes against the same religions he had castigated before. He was arrested and charged with street preaching without a permit. On the trial he admitted that, while there was no trouble at his exhortations when a police officer was present, trouble there was when the police were absent.

While the ordinance does not specifically mention revocation of licenses, for cause, we think such power is fairly implied and, an any case, the alleged illegality of a revocation is reviewable by appropriate civil proceedings in the nature of certiorari (Civ. Prac. Act, art. 78). Since the licensing law was valid, one who preached without a license was guilty of a violation, and any impropriety of the revocation of a former license was no defense. We think, too, that once the 1946 permit was revoked for good reasons, the commissioner was not bound to issue further permits. The commissioner had no reason to assume,

and no promise was made, that defendant wanted a new permit for any uses different from the disorderly ones he had been guilty of before. The police regulations, printed on the permit and mentioned above, say that "all meetings must be conducted in an orderly manner"—surely a modest requirement—and defendant had shown that his utterances were of the kind that usually do, and in defendant's case, did, result in disorder, except when the police provided protection. As the Magistrate pointed out at the close of this trial: "in a large city like this City of New York, bearing in mind that religion is a very tender emotion amongst most human beings, that this statute is not only constitutional but desirable, extremely desirable, that for the protection of the people who are going to do the speaking themselves it is necessary in a big city like ours where people become so emotional and might very well inflict serious bodily harm." Actually, what defendant here insists on as his constitutional right is not only a permit irrevocable for any cause, but the regular attendance at his meetings of a cordon of policemen to curb the wrath of those whose deepest feelings he wantonly wounds. He claims a constitutional right to incite riots, and a constitutional right to the services of policemen to quell those riots. It seems to us that if a community can bar from its streets all raucously noisy advertising devices (*Kovacs* v. *Cooper*, 336 U. S. 77) it may stop defendant from starting religious wars on New York's teeming thoroughfares.

It may be that the first sentence of this ordinance, making it unlawful for anyone "to ridicule or denounce any form of religious belief, service or reverence", if read off by itself, and without relation to the rest of the ordinance, or of these facts, might be thought unconstitutional. But we have no such question here. This man got his permit with no questions asked as to what he would preach. But he used that permit to spew out insults and epithets; public order and decency required that he be stopped (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572), and after due hearing and full proof, he was stopped. As the Supreme Court said in the *Chaplinsky* case (*supra*) no constitutional problem is raised by the prevention and

punishment of "insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" (315 U. S. at p. 572). It is the duty of the police to end such disorder.

In arriving at these conclusions we have not relied on *People* v. *Smith* (263 N. Y. 255, appeal dismissed 292 U. S. 606) which held valid and constitutional this very statute, but have considered the question anew, on the facts of this particular case.

The judgment should be affirmed.

Conway, J. (dissenting). Defendant has been convicted of unlawfully conducting a religious meeting without a permit in violation of section 435-7.0 of chapter 18 of the Administrative Code of the City of New York. The conviction has been affirmed by the Appellate Part of the Court of Special Sessions and the case is here by permission of a Judge of this court.

Section 435-7.0 reads, in full, as follows:

"a. *Public worship.*—It shall be unlawful for any person to be concerned or instrumental in collecting or promoting any assemblage of persons for public worship or exhortation, or to ridicule or denounce any form of religious belief, service or reverence, or to preach or expound atheism or agnosticism, or under any pretense therefor, in any street. A clergyman or minister of any denomination, however, or any person responsible to or regularly associated with any church or incorporated missionary society, or any lay-preacher, or lay-reader may conduct religious services, or any authorized representative of a duly incorporated organization devoted to the advancement of the principles of atheism or agnosticism may preach or expound such cause, in any public place or places specified in a permit therefor which may be granted and issued by the police commissioner. This section shall not be construed to prevent any congregation of the Baptist denomination from assembling in a proper place for the purpose of performing the rites of baptism, according to the ceremonies of that church.

"b. *Interference with street services.*—It shall be unlawful for any person to disturb, molest or interrupt any

clergyman, minister, missionary, lay-preacher or lay-reader, who shall be conducting religious services by authority of a permit, issued hereunder, or any minister or people who shall be performing the rite of baptism as permitted herein, nor shall any person commit any riot or disorder in any such assembly.

"c. *Violations.*—Any person who shall violate any provision of this section, upon conviction thereof, shall be punished by a fine of not more than twenty-five dollars, or imprisonment for thirty days, or both."

The police commissioner, in compliance with the second sentence of subdivision a (*supra*) has adopted certain implementing administrative procedure. Applications for a permit are made at the division of licenses of the police department. Permits are issued for a year, expiring on December 31st of the year of issuance. No fee is charged for the permit. The questions on the application blank for the permit are designed to elicit information as to whether the applicant is one of the persons specified as eligible for a permit. No inquiry is made in the application blank as to the proposed time and place of the religious meetings to be held by the applicant, but the pertinent regulations of the police department, which are printed on the permit itself, provide in part that the holder of the permit will be required to notify the commanding officer of the precinct of the time and location of any street meeting he or she intends to hold, and that the commanding officer "will approve" of the location provided it does not interfere with traffic or other local conditions.

Defendant describes himself as a preacher who goes out on the highways and byways and preaches the word of God. He speaks under the auspices of "Outdoor Gospel Work" of which he is the director. He has had no formal training beyond grammar school—"Just the Word"—but was "ordained to the work of the Gospel Ministry" in 1946 by a "counsel of pastors" in Brooklyn and has been preaching for about six years.

In 1946, defendant applied for and received a public worship permit. The police department soon received numerous complaints that he had ridiculed and denounced cer-

tain religious beliefs while conducting his meetings. Hearings at which eighteen complainants appeared and testified were held by a deputy police commissioner on two days in October and November of 1946. The deputy police commissioner determined that the complaints were substantiated and revoked defendant's permit. The letter so advising defendant read in part as follows: "The complaints, in my opinion, have been fully substantiated. My determination in the matter is that you have, contrary to the provisions of law under which the permit was issued, ridiculed and denounced religion, and I am, therefore, in the exercise of discretion, as provided by law, revoking your permit effective forthwith." Defendant applied for another permit the next year, 1947, and again in 1948. Each time he received a notice that his application had been "Disapproved".

On September 11, 1948, commencing about 9:00 P. M., defendant conducted a religious meeting at Columbus Circle, between 58th and 59th Streets, in New York City. He was standing on a box or platform addressing a group of approximately twenty people. According to the testimony of the arresting officer and two members of the street audience, a major portion of defendant's address was devoted to attacks upon the Roman Catholic Church, and upon the Jewish people and Jewish faith. As to the Roman Catholic Church, for instance, he said that it made merchandise out of souls; that it is a religion of the devil. As to the Jewish people and their faith, he said "All the garbage that didn't believe in Christ should have been burnt in the incinerators. It's a shame they all weren't." Before he ascended the platform, another speaker, apparently arranged for by defendant, had been speaking about the Jewish people and when some in the audience objected, the defendant spoke of the latter as "Christ-killers." Defendant did not deny the attacks but sought to justify them. There is no evidence of any disorder or breach of the peace in connection with this particular meeting, but defendant testified, generally, that while he had "no trouble at all" at his meetings when a police officer was present, he did have trouble in the absence of an officer. About 10:45 P. M., after he had been conducting the meeting for nearly two hours, a police officer approached defendant and asked him for his permit

to conduct the meeting. Defendant, of course, did not have one and was served with a summons for violation of the Administrative Code.

At the close of the People's case in the Magistrate's Court, counsel for defendant moved to dismiss the complaint on the ground that the statute upon which it was based was unconstitutional on its face as an abridgement of the freedoms of religion and speech guaranteed by the Federal and State Constitutions. At the close of the case, defendant's counsel renewed the motion on the ground that the statute as applied was unconstitutional.

The First Amendment to the Constitution of the United States guarantees the rights of freedom of speech, press, religion and assembly against abridgement by congressional action, and the due process clause of the Fourteenth Amendment protects those rights against invasion by State or municipal action. (*Lovell* v. *City of Griffin*, 303 U. S. 444, 450, and cases there cited.) Beyond that, however, our own State Constitution is explicit in assuring those rights within our borders. (N. Y. Const., art. I, §§ 3, 8, 9.) But freedom of speech, press, religion, and assembly, often denominated our "civil liberties", are not absolute rights to be indiscriminately exercised under all circumstances and under all conditions. Social welfare requires, in certain instances, reasonable regulation of such activities which, unrestrained, would produce calamitous or undesirable results—not only for the locality and public order but also, in the long run, for the individual involved.

Since our streets and public places are traditionally and sometimes the only available forum for the dissemination and propagation of ideas, the widest possible latitude must be permitted thereon for free expression and communication, however unpopular or misguided such ideas may seem to be. Municipalities, however, have a deep and legitimate interest in the manner in which their streets and public places are used. Specifically, municipalities have the power and are charged with the duty of maintaining safety and order upon streets and in public places for the comfort and convenience of the community. It is a matter of common knowledge that "collecting and promoting" assemblages of persons by street speakers sometimes occasions alterca-

tions and breaches of the peace. Particularly may that be so when the assemblage on the street is for public worship or exhortation. Likewise, it is common knowledge that such assemblages may disrupt traffic, both pedestrian and vehicular, and destroy the primary purpose of the streets as a means of travel and transportation from place to place. These are evils with which the municipality must cope and which the courts, subject to the constitutional guarantees, must recognize. In dealing with the problem, all branches of government must try to accommodate fairly the twin goals of unlimited freedom of speech, religion and assembly for all and the vigilant protection of the comfort, safety and convenience of all. This problem was well analyzed by Chief Justice Hughes in *Cox* v. *New Hampshire* (312 U. S. 569, 574, quoted hereafter at pp. 288-289 of this opinion).

The statute before us is said to be unconstitutional on its face, i. e., that under no circumstances may it be constitutionally applied. That contention is predicated, however, upon certain assumptions as to the question before the court and as to the scope and operation of the statute, which in our view are incorrect. We must first construe and interpret a statute so that its exact meaning may be clear before an attempt is made to determine whether it is violative of the Constitution. In approaching that primary task, we must adopt the basic principle that, when possible, a statute will be construed and interpreted in such manner as to avoid not only a finding of unconstitutionality but also to avoid any serious doubt upon that score. The cogent reason behind that principle is that legislative bodies, no less than the courts, are presumed to be imbued with respect for our constitutional provisions and to be unwilling to destroy a right guaranteed by the Constitution. (*People* v. *Barber*, 289 N. Y. 378, 385.) Thus, if there be any possibility that an enactment may be read in such manner as to avoid objections as to its constitutionality, that construction is to be preferred.

Since defendant is concededly within the group of persons specified in the second sentence of subdivision a, and has not been convicted of ridiculing or denouncing any form of religious belief, service or reverence, the sole issue before us, in considering whether the statute is void on its face,

is whether that portion, applicable to a person so situated as the defendant, can be constitutionally applied under any circumstances. (*Marbury* v. *Madison*, 1 Cranch [U. S.] 137; *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549, 568 *et seq.*, and cases there cited; *Headley* v. *City of Rochester*, 272 N. Y. 197, 204; *O'Kane* v. *State of New York*, 283 N. Y. 439, 449.) In deciding that issue we must read the requirements of the statute in the light of administrative procedures set up by the police department to implement it. Thus, we find, it provided that certain persons, of whom defendant is one, may obtain permits from the police commissioner to conduct religious services in any public place or places specified in the permit. The police commissioner obviously sought to lighten the burden of continuous daily or weekly applications for such permits by adopting regulations authorizing the issuance of a blanket permit, effective for the applicant for a year, and requiring the permittee merely to notify the local precinct commander of the time and place of any street meeting he or she might intend to hold. In ultimate effect, the commissioner issues a permit permanently to those persons specified in subdivision a, merely requiring a new application each year as a current administrative measure, thus assuring for himself an up-to-date list of living, practicing individuals who intend to conduct religious services on the public streets. The regulations further provide that said precinct commander "will approve" the location provided it does not interfere with traffic or other local conditions.

Reading the statute and the administrative machinery together, and mindful of the constitutional prohibition against antecedent censorship, we read it to provide that the police commissioner is under a duty to issue the permit as a matter of course upon application by a person eligible therefor. This construction of the statute is warranted by its terms and obviates constitutional objections.

There is no doubt that the statute was enacted with a two-fold purpose. One objective was to lessen the possibility of disorder or breaches of the peace reasonably to be foreseen as a result of unregulated collection of assemblages in the streets for the espousal of, or attacks upon, religion in general or some particular practice or form of religious belief.

The second aim was to insure to the general public, without undue interruption or impairment, the normal use of the streets as a means of travel and transportation.

The first objective is sufficiently satisfied by the permit requirement itself, for, once put on notice that such a meeting will be held, the police may take such precautions as appear necessary. We see no warrant in the statute for the exercise of discretion by the police commissioner as to whether or not a particular applicant for a permit is likely to discuss matters which would have a tendency to provoke dispute and disorder. The statute does not give the commissioner any such express power and, since such discretion would confer upon him a power of antecedent administrative censorship, we certainly should not read it into the statute by construction. To allow the commissioner to refuse a permit whenever, in his discretion, he thought that the applicant might by his utterances provoke disorder or a breach of the peace would undoubtedly be extremely effective in preventing such occurrences, but by the same token such a discretion would make the commissioner a censor over what might and what might not be discussed on the streets of the city. That the socially desirable end of prevention of disorder may not thus be attained by infringement upon the freedom of speech and assemblage is firmly established. (See *Hague v. C. I. O.*, 307 U. S. 496, 514-517; *Terminiello v. Chicago*, 337 U. S. 1.) Of course, this does not mean that a street speaker may, with impunity, provoke or incite a riot or breach of the peace. Such conduct is properly declared unlawful by our Penal Law (see, e. g., art. 70, "Disorderly Conduct", and art. 188, "Riots and Unlawful Assemblies") and may be punished by appropriate action. The constitutional guarantee requires only that a municipality may not adopt unconstitutional means, i. e., censorship or previous restraint to prevent disorder.

Moreover, in view of the existing permit procedure, the second evident purpose of the ordinance is satisfied by the requirement that a holder of a permit notify the precinct commander of the time and location of any meeting he or she intends to conduct. The commissioner does not purport to make any determination as to the public convenience of the time and place of the proposed meeting *in advance* of the

issuance of the permit. That determination is made only *after* the permit is granted. Accordingly, the proper construction of the second sentence of subdivision a, and we so read it, is that the commissioner must issue a permit as a matter of course upon application therefor by an eligible person. At that point the commissioner's power is merely ministerial and not discretionary.

Thus viewed, the permit procedure set up in compliance with the ordinance grants no right of censorship or previous restraint to the commissioner and does not unconstitutionally infringe upon the freedoms of speech, religion and assembly. The permit procedure is substantially identical with that authorized by the park department regulation we unanimously sustained in *People* v. *Nahman* (298 N. Y. 95) and *People* v. *Hass* (299 N. Y. 190) and the language there used is by analogy appropriate here, substituting the words "public streets" for "public parks". In the *Nahman* case (*supra*) we said (pp. 102-103): "The regulation, we repeat, confers no power to suppress the publication of facts or opinions. On the contrary, as we have tried to demonstrate, it is in essence a nondiscriminatory provision which has for its sole objective the safety, comfort and convenience of the people of the city in their appropriate uses of its public parks. To our minds, the regulation—so read—is a reasonable measure of local control which affects civil liberties only in an allowable minor degree."

The *Nahman* and *Hass* cases (*supra*) it should be noted, do not proceed upon the broad theory that the State, or a municipality thereof, has plenary power over the use of its streets and public places and may limit or prohibit, in whole or in part, their use for speeches or meetings. Indeed, those decisions strongly indicate the contrary and, to that extent, would seem to qualify our previous decision in *People* v. *Smith* (263 N. Y. 255). In the *Smith* case (*supra*) we said in part (p. 257): "The legislative power might forbid public meetings and speaking in the streets entirely. It may limit the use of the streets to certain purposes." Such a theory had been previously expressed by such eminent authorities as Justice Holmes in *Commonwealth* v. *Davis* (162 Mass. 510) and Justice White, on the affirmance by the

Supreme Court, *sub nomine Davis* v. *Massachusetts* (167 U. S. 43, 48). The "plenary power" theory, however, has been specifically repudiated by the Supreme Court in subsequent cases (see *Hague* v. *C. I. O.*, *supra*, at p. 515; *Jamison* v. *Texas*, 318 U. S. 413, 417; *De Jonge* v. *Oregon*, 299 U. S. 353, 364) and by the Massachusetts court itself (*Commonwealth* v. *Gilfedder*, 321 Mass. 335, 340). Thus, in the *Hague* case (*supra*) Justice ROBERTS stated (p. 515): "* * * Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. * * *." By refusing to place our decisions in the *Nahman* and *Hass* cases (*supra*), upon any such broad ground, we have recognized this development.

The permit procedure which implements the second sentence of subdivision a of the ordinance also satisfies the standards of permissible State police power approved by the Supreme Court of the United States. That court has not categorically condemned legislation which requires a permit as a condition to the use of the streets or public places for purposes of discussion, assembly or expression. The court has been careful to acknowledge the direct and legitimate interest of States and municipalities in the preservation of the safety, order and peace of the community. In a series of cases, the Supreme Court has struck down legislation which absolutely prohibits or levies a tax upon persons desiring the use of the streets for the expression or communication of ideas through the medium of handbills or pamphlets or for canvassing. (See *Schneider* v. *State*, 308 U. S. 147; *Jamison* v. *Texas*, 318 U. S. 413, *supra*; *Murdock* v. *Pennsylvania*, 319 U. S. 105; cf. *Lovell* v. *City of Griffin*, 303 U. S. 444, *supra*.) The court has also declared unconstitutional ordinances which require permits, the issuance of which is left to the undefined and uncontrolled discretion of a local official, for such activities on the public streets as solicitation for religious causes (*Cantwell* v. *Connecticut*,

310 U. S. 296), distribution of religious publications (*Largent* v. *Texas*, 318 U. S. 418; cf. *Lovell* v. *City of Griffin*, *supra*) or operation of a sound truck. (*Saia* v. *New York*, 334 U. S. 558; but cf. *Kovacs* v. *Cooper*, 336 U. S. 77.) The court has invalidated an ordinance which required a permit for public assembly on public streets and places, although the ordinance specifically provided that "said permit shall only be refused for the purpose of preventing riots, disturbances or disorderly assemblage." (*Hague* v. *C. I. O.*, 307 U. S. 496, *supra*.) The court there noted that "uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right." (P. 516.) The vice of the ordinance in the *Hague* case was explained by Chief Justice Hughes in *Cox* v. *New Hampshire* (312 U. S. 569, 577, *supra*): "* * * it did not make comfort or convenience in the use of streets the standard of official action but enabled the local official absolutely to refuse a permit on his mere opinion that such refusal would prevent 'riots, disturbances or disorderly assemblage.'"

Clearly, none of those situations is presented by the permit procedure here involved in view of our construction of the commissioner's power over issuances of the permits. As we have already indicated, the permit procedure vests no uncontrolled discretion in the commissioner. Instead, he must issue the annual permit as a matter of course upon application therefor by an eligible person. Subsequently, it is true, the precinct commander must determine whether the proposed time and place of the meeting will interfere with traffic or other local conditions. While this power of the precinct commander enables him to exercise a certain restraint upon freedom of speech, the restraint is so small as compared with the obvious social utility and necessity of regulation that it does not violate the constitution. It "is a reasonable measure of local control which affects civil liberties only in an allowable minor degree." (*People* v. *Nahman*, 294 N. Y. 95, 103, *supra*.) The existence of and the reason for that State power to impose slight limitations upon civil liberties in such situations was well stated by Chief Justice Hughes in the *Cox* case (*supra*). There, the

Supreme Court upheld a conviction based upon an ordinance prohibiting an unlicensed parade or procession upon any public street or way. He said in part (p. 574): "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions. As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." Finally, it is important to note that the present Supreme Court in October of this year refused to review our decision in *People* v. *Hass* (*supra*), on the ground that it did not present a Federal question, and thus that a permit requirement is not, in and of itself, an unconstitutional procedure.

Nor does the fact that the permit procedure is limited to the collection of assemblages by speakers on topics pertaining to religion and does not apply to topics unrelated to religion render it invalid. The local legislative body, in its wisdom, may determine that street meetings for discussions

of matters or religion are fraught with such potentialities of disorder and violence that some regulation is imperative in the interest of public tranquility. (For instance, here the defendant quite frankly stated that he had no trouble during his discussions if there were an officer beside him, but that he customarily did when an officer was not present.) Such determination results in a classification founded upon reason, and, as such, is not invalid. This point was squarely decided by us in *People* v. *Smith* (263 N. Y. 255, *supra*), where we said, per POUND, Ch. J. (p. 257): "* * * The passion, rancor and malice sometimes aroused by sectarian religious controversies and a[illegible]ks on religion seem to justify especial supervision over those who would conduct such meetings on the public streets. That the ordinance does not cover all street meetings is no objection to a reasonable classification. Practical exigencies and common experience may permit the recognition of degrees of harm and the limitation of regulation to classes where the need is deemed to be clearest." Defendant's appeal to the Supreme Court in that case was dismissed for want of a substantial Federal question (292 U. S. 606, [1933]), the three cases cited by that court indicating that the reasonableness of the classification was deemed the question sought to be reviewed. Thus, on the point of whether the municipality may constitutionally regulate religious street meetings and not others, the *Smith* case (*supra*) is controlling.

While the relevant portions of the statute and the implementing administrative procedure are not in violation of the Constitution, we think it clear that the application of the permit procedure to this defendant constituted a violation of his right of freedom of speech and assembly. As previously stated, a permit, effective for a year, had been duly issued to defendant in 1946. In the fall of that year, however, the permit was revoked by the police commissioner, in his discretion, on the ground that defendant had ridiculed and denounced religion. Applications by defendant for a permit in 1947 and 1948 were disapproved. Manifestly, the reason for such disapproval was the commissioner's determination that defendant, if permitted to speak, would again ridicule and denounce religion.

This conduct on the part of the commissioner was not justified in law and amounted to administrative censorship. It was a previous restraint upon defendant's right to speak. Unlike the application of the permit procedure we approved in the *Nahman* and *Hass* cases (*supra*), the commissioner here utilized the permit procedure to prevent the publication of facts or opinions whatever one may think of them. No such authority is granted to him by the statute itself and, as stated above, it cannot be constitutionally read into it by construction. Assuming that the prohibition against ridiculing or denouncing religion is constitutional, the sole means of enforcement is through a criminal action charging its violation or in a proper case charging disorderly conduct under section 722 of the Penal Law; section 1458 of the New York City Consolidation Act (L. 1882, ch. 410); *People* v. *Galpern* (259 N. Y. 279, 282), and *People* v. *Hipple* (263 N. Y. 242). (See, also, New York City Charter, § 435.) It cannot be enforced by a trial of the alleged offender before an administrative officer, nor can an administrative finding of guilt thereof be made the basis for a refusal to grant a permit.

Police protection may well be necessary to secure for this defendant his constitutional right to speak freely as an ordained Baptist clergyman. The Constitution does not discriminate between those whose ideas are popular and those whose views arouse hatred and animosity—guaranteeing the right of freedom of speech to the former and withholding it from the latter. This defendant has the right to express himself concerning religious beliefs, no matter how misguided and unpopular they may be and if his exercise of that right arouses passion in the community and requires the attendance of police officers, that is a small cost which must be paid by us for our continued freedom. We may expect from his past actions that the defendant will in the future go beyond the mere expression of ideas, and so speak as to incite disturbances and breaches of the peace. When and if he does, he may be punished therefor in an appropriate criminal action but justifiable expectations do not authorize the commissioner to refuse to permit the defendant to speak about religion in the future on the streets of the city of New York.

Since the permit requirement in the second sentence of subdivision a of section 435-7.0 of the Administrative Code was thus unconstitutionally applied to the defendant, his conviction, based upon his failure to possess a permit which he has demonstrated is impossible of procurement, cannot stand. It is not an answer to say that defendant, after exhausting his administrative remedies, should then have retained counsel to institute an expensive and lengthy article 78 proceeding, in order to enjoy his elementary constitutional rights.

The order of the Appellate Part of the Court of Special Sessions should be reversed and the complaint dismissed.

Bromley, J. (dissenting). By its terms section 435-7.0 of the Administrative Code of New York City prohibits the public discussion of religious topics in "any street" of that city by anyone who is not, at least, a member of "any church or incorporated missionary society", or an "authorized representative of a duly incorporated organization devoted to the advancement of the principles of atheism or agnosticism". One who is a member of a group permitted to discuss religion may do so "in any public place or places specified in a permit therefor which may be granted and issued by the police commissioner." The statute also makes it unlawful for any person "to ridicule or denounce any form of religious belief" in a street or public place.

As construed by the police commissioner the statute gives him discretion to deny a permit to one whose past conduct has indicated that, if permitted to speak, he will ridicule and denounce religion, or a particular faith, so as to provoke disorder. Appellant Kunz received a permit to speak during the year 1946. The police commissioner has exercised his discretion to revoke that permit, and to deny Kunz annual permits for 1947 and 1948. The revocation, and presumably the denials, rested upon an administrative finding that Kunz had "ridiculed and denounced religion" upon several occasions in 1946. Kunz has been convicted for conducting a religious meeting without a permit on September 11, 1948, at Columbus Circle in New York City.

Unless the prohibition against ridicule and denunciation of religion shall be read as indicating a criterion to be em-

ployed by the police commissioner in determining whether to grant or withhold a permit, the statute provides no limit to his discretion. The law has been so construed by that officer, and his construction accords with the fair import of its terms. It is here immaterial that the police commissioner has followed a practice of granting automatically a permit to any of the persons described in the statute on first application therefor. Moreover, it should be noted that the police commissioner apparently is to determine whether or not an applicant for a permit falls within one of those groups whose speech is tolerated.

Numerous decisions of the Supreme Court of the United States, since this ordinance was sustained by us in 1934 (*People* v. *Smith*, 263 N. Y. 255), indicate clearly that the requirement of a permit for the exercise of the rights of speech, assembly or religion in public places is invalid under the Fourteenth Amendment if the licensing official is afforded discretion to grant or withhold a permit upon criteria so broad as these (*Saia* v. *New York*, 334 U. S. 558; *Largent* v. *Texas*, 318 U. S. 418; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Schneider* v. *State*, 308 U. S. 147; *Hague* v. *C. I. O.*, 307 U. S. 496). In each case wherein such statutes have been sustained it was plain that the permit requirement served only two legitimate ends—to permit determination of the appropriate place and time for a proposed assembly with respect to the convenience of others, and to afford notice to the authorities of an assembly which might provoke disorder—without regard to the content of proposed speech (*Cox* v. *New Hampshire*, 312 U. S. 569; *People* v. *Hass*, 299 N. Y. 190; *People* v. *Nahman*, 298 N. Y. 95). Although a State may venture beyond those purposes in a legitimate effort to avert serious threat of disorder by a statute "narrowly drawn to prevent the supposed evil" (*Cantwell* v. *Connecticut*, *supra*, at p. 307), no such attempt is apparent in this law.

We are asked to construe the ordinance as precisely analogous to the provisions considered in *People* v. *Nahman* and *People* v. *Hass* (*supra*). The courts have been "inclined to adopt that reasonable interpretation of a statute which removes it farthest from possible constitutional infirmity"

(*Kovacs* v. *Cooper*, 336 U. S. 77, 85). However, a limitation inheres in that doctrine; strained and unnatural interpretation should not be employed to preserve a law so vulnerable as section 435-7.0 (see *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 519-521).

If the vice of this law were not apparent in its terms, the impact of its administration upon Kunz should demonstrate beyond cavil that he has suffered an invalid and absolute previous restraint upon his right to discuss religion in public. His case affords a striking parallel to *Near* v. *Minnesota* (283 U. S. 697). There the future publication of a newspaper had been enjoined upon the ground that it had offended in the past through publishing "malicious, scandalous and defamatory articles" (p. 703). The evil of the injunction inhered in the censorship it established, for Near could have resumed publication under threat of a contempt penalty for matter found invidious by the court. The absolute and previous restraint upon the speech of Kunz surely can stand upon no stronger ground than the decree condemned in *Near* v. *Minnesota* (*supra*).

Section 435-7.0 of the Administrative Code of New York City should be held invalid upon its face under the Fourteenth Amendment to the United States Constitution and under those provisions of the New York Constitution which guarantee freedom of speech and religion (art. I, §§ 3, 8). The judgment should be reversed and the complaint dismissed.

Loughran, Ch. J., Lewis and Dye, JJ., concur with Desmond, J.; Conway, J., dissents in opinion; Bromley, J., dissents in separate opinion in which Fuld, J., concurs.

Judgment affirmed.